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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MYRICK TANTIADO, an individual,	)	Case No. C 07-02874 CRB
)	
Plaintiff,	)	DEFENDANT POWER MEDICAL
	)	INTERVENTIONS, INC.'S NOTICE
	)	OF MOTION AND MOTION FOR
v.	)	PARTIAL SUMMARY JUDGMENT;
	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT
	)	THEREOF
POWER MEDICAL INTERVENTIONS, a)	
Pennsylvania corporation, and DOES ONE	)	Hearing Date: September 5, 2008
through FIFTY, inclusive,	)	Time: 10:00 a.m.
	)	Judge: Hon. Charles R. Breyer
Defendants.	)	Courtroom: 8

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 5, 2008, at 10:00 a.m., or as soon thereafter as
counsel can be heard, in Courtroom No. 8 of the above-entitled Court, located at 450 Golden Gate

1 Avenue, San Francisco, California, before the Honorable Charles R. Breyer, defendant Power
2 Medical Interventions (“PMI”) will and hereby does move the Court pursuant to Rule 56(c) of the
3 Federal Rules of Civil Procedure for partial summary judgment for PMI and against plaintiff
4 Myrick Tantiado (“Tantiado”) on Count I (wrongful termination in violation of public policy) and
5 the portion of Count II alleging that PMI unlawfully failed to reimburse Tantiado for expenses he
6 incurred during his employment with PMI.

7 The grounds for said motion are that there is no triable issue of material fact as to
8 Tantiado’s wrongful discharge in violation of public policy and expense reimbursement claims
9 against PMI, and that PMI is thus entitled to partial summary judgment against Tantiado on these
10 claims as a matter of law.

11 This motion is based upon this Notice of Motion and Motion, the accompanying
12 Memorandum of Points and Authorities, and Declarations of Michael Whitman, Pat Steffan, Rita
13 Esposito, and John E. Duke in support, all served and filed concurrently herewith, all pleadings
14 and papers on file in this action, and such other evidence and argument as may be presented to the
15 Court before and at the time of the hearing on the motion.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiff Myrick Tantiado is a former at-will sales employee of defendant Power Medical Interventions, Inc. ("PMI") who believes it violates public policy to discharge a sales employee for having poor sales numbers and being disengaged from his job. Tantiado alleges that PMI terminated his employment in retaliation for expressing his "discomfort" with selling a subset of PMI's products to someone who had no role in the decision to terminate his employment. Tantiado further claims that PMI unlawfully failed to reimburse him for accrued expenses when it offset a commission from the sale of products that were ultimately returned against his final expense reimbursement.

PMI is entitled to summary judgment on these claims. In order to establish a *prima facie* case of wrongful discharge in violation of public policy under California law, Tantiado must establish that (1) he engaged in an activity protected by public policy; (2) PMI subjected him to an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Tantiado cannot establish the first or third prongs. Tantiado's expressions of "discomfort" hardly count as engaging in an activity protected by public policy and, therefore, fall short of the evidence necessary to establish the first element of the claim. But even if the Court were to ignore the absence of any protected activity, Tantiado's wrongful discharge claim fails for the simple reason that he admits he never expressed his "discomfort" or otherwise complained about the safety of PMI's products to the lone individual who decided to terminate his employment, PMI's CEO Michael Whitman and, therefore, cannot establish causation. The only information Whitman had before him when he decided to terminate Tantiado's employment is that Tantiado's sales numbers were not good and that Tantiado had lost the motivation to sell PMI's products.

Tantiado's expense reimbursement claim fares no better. Tantiado's claim is not so much for expense reimbursement as it is a claim for the commission that was offset against his expense reimbursement. California law is clear that the right to a commission depends on the terms of the

1 commission plan. Under PMI's commission plan, sales commissions paid to its sales
2 representatives are subject to offset if those same products are subsequently returned by customers.
3 For months before Tantiado's employment terminated, the University of California San Francisco
4 had been trying to return products for which PMI had already paid Tantiado a commission, but
5 Tantiado was either nonresponsive or an obstacle to the University of California San Francisco's
6 efforts. Accordingly, once the products were returned, PMI offset the commission it had already
7 paid Tantiado for those products against his expense reimbursement and paid Tantiado the
8 difference. In short, Tantiado got exactly what he was owed. There is nothing unlawful about
9 that. Regardless, if the allegations of Tantiado's complaint are true, he is not entitled to
10 reimbursement anyway. California Labor Code § 2802(a), the statutory provision governing
11 employee expense reimbursements, requires an employer to indemnify an employee for
12 expenditures or losses incurred by the employee "unless the employee, at the time of obeying the
13 directions, believed them to be unlawful." Here, Tantiado alleges that by selling certain of its
14 products, PMI "violated 21 U.S.C.A. § 351(e) and related FDA regulations including 21 CFR 803
15 and 21 CFR et seq." Accepting this allegation as true, he is not entitled to reimbursement under
16 California Labor Code § 2802's plain language since Tantiado believed that the sale of PMI's
17 products was unlawful.

18 There are no genuine issues of material fact on these claims. PMI is entitled to summary
19 judgment.¹

20 **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

21 1. Power Medical Interventions, Inc. ("PMI") is an integrated medical device company
22 that develops and sells computer-assisted, power-actuated endomechanical instruments that
23 surgeons use for cutting, stapling and tissue manipulation in bariatric, cardiothoracic, colorectal
24 and general surgical applications.

25 2. PMI sells its products through its direct sales force.

26
27 ¹ PMI does not move for summary judgment on Tantiado's claim that PMI has unlawfully failed to
28 pay his accrued vacation.

1 3. PMI hired Tantiado as an at-will Sales Associate for PMI's San Francisco territory in
2 July 2004. (Deposition of Myrick Tantiado ("Tantiado Dep.") at 47-48; Tantiado Dep. Ex. 3.)

3 4. Tantiado's compensation package included commissions on "net sales." (Tantiado
4 Dep. Ex. 3.)

5 5. Tantiado understood a "net sale" to be defined in accordance with industry practice.
6 (Tantiado Dep. at 40.)

7 6. Under the industry practice -- and therefore, PMI's commission policy -- sales
8 commissions paid to sales representatives are subject to offset if those same products are
9 subsequently returned by customers during the evaluation period. (Deposition of Robert Chase
10 ("Chase Dep.") at 49-50; Defendant Power Medical Intervention's Supplemental Answers to
11 Plaintiff's First Set of Interrogatories, Answer to Interrogatory No. 22.)

12 7. Tantiado's job was to increase sales of the full line of PMI's products. (Tantiado Dep.
13 at 65.)

14 8. During Tantiado's employment at PMI, PMI had three product lines: straight linear
15 cutters, right-angle linear cutters, and circular staplers. Although the number of products in each
16 product line expanded over the course of Tantiado's employment at PMI, there were typically
17 three to four products in each product line. (Tantiado Dep. 65; Chase Dep. at 59.)

18 9. When Tantiado started working for PMI, he reported to Robert Chase, Regional
19 Manager for Tantiado's sales territory. (Tantiado Dep. 48-49; Tantiado Dep. Ex. 3.)

20 10. Shortly after Tantiado began working for PMI, PMI provided Tantiado with training on
21 its sales procedures, which included training on PMI's product return policy. (Tantiado Dep. at
22 72; Tantiado Dep. Ex. 14.)

23 11. Under PMI's return policy, customers are entitled to return products within 60 days of
24 purchase, unless this 60-day evaluation period is extended. (Tantiado Dep. at 72; Tantiado Dep.
25 Ex. 14.)

1 12. Tantiado also received training on the procedures PMI has established to report
2 problems with PMI's products, such as when a product fails during surgery. (Tantiado Dep. at 69-
3 70.)

4 13. These procedures require an employee promptly after receiving a product complaint to
5 submit an "Initial Contact Report" ("ICR") describing the problem to PMI's Quality Assurance
6 Department ("QAD") and to provide a copy of the ICR to his or her supervisor. Upon receiving an
7 ICR, the QAD processes it to evaluate whether PMI should report the problem to the United States
8 Food and Drug Administration ("FDA"). (Tantiado Dep. at 69-70; Tantiado Dep. Ex. 13.)

9 14. Tantiado submitted ICRs throughout his employment at PMI. (Tantiado Dep. at 101-
10 102.)

11 15. Tantiado received his first performance evaluation on November 1, 2004. (Tantiado
12 Dep. at 74; Tantiado Dep. Ex. 16.)

13 16. This performance evaluation covered the first 60 days of Tantiado's employment with
14 PMI and stated that his "performance over the past two months (Sept-Oct, 2004) ranks you as one
15 of the top performing Sales Associates for PMI." (Tantiado Dep. at 74; Tantiado Dep. Ex. 16.)

16 17. Tantiado remained successful and received the "Regional Sales Representative of the
17 Year 2004" award. (Tantiado Dep. at 75-76; Tantiado Dep. Ex. 18)

18 18. Effective January 3, 2005, Tantiado was promoted to Senior Sales Associate for the
19 San Francisco territory. (Tantiado Dep. at 77-78; Tantiado Dep. Ex. 19.)

20 19. After this promotion, Tantiado continued to report to Chase. (Tantiado Dep. at 81;
21 Tantiado Dep. Ex. 19.)

22 20. On February 13, 2006, PMI's CEO, Michael Whitman, promoted Tantiado to Regional
23 Manager with responsibility for managing PMI's California sales force and demoted Chase to the
24 Senior Sales Associate position Tantiado had previously held. (Tantiado Dep. at 82-83, 87;
25 Tantiado Dep. Ex. 20.)

26 21. Less than two months later, Tantiado requested that he be returned to a Senior Sales
27 Associate role. (Tantiado Dep. at 90.)
28

1 22. PMI granted his request and, effective April 3, 2006, Tantiado and Chase switched
2 positions once again: Tantiado became a Senior Sales Associate, Rob Chase became Regional
3 Manager, and Tantiado recommenced reporting to Chase. (Tantiado Dep. at 95.)

4 23. But unlike before, Tantiado now had a sales quota and the amount he would receive in
5 commissions would depend on his meeting or exceeding his quota. (Tantiado Dep. at 92).

6 24. PMI implemented its quota system because it wanted to motivate its sales force to
7 increase sales. (Tantiado Dep. at 93.)

8 25. There was no particular sales quota for any specific product. Rather, the sales quota
9 could be satisfied by selling any combination of PMI's products. (Tantiado Dep. at 123.)

10 26. Tantiado did not "believe that Power Medical, PMI cared whether we sold one line or
11 the other." (Tantiado Dep. at 123.)

12 27. Tantiado became increasingly uncomfortable selling PMI's circular stapling products
13 throughout his employment at PMI because various surgeons reported to him that they had
14 "issues" with PMI's circular staplers, which in some instances had resulted in harm to patients.
15 (Tantiado Dep. at 98.)

16 28. Tantiado submitted ICRs documenting each such report he received to the QAD.
17 (Tantiado Dep. at 101-102.)

18 29. In 2006, Tantiado's sales performance began to decline. (See Affidavit of Pat Steffan
19 ("Steffan Aff.") ¶¶ 2-3, and Exhibits thereto.)

20 30. In the Spring of 2006, at a meeting of the American Society of Bariatric Surgeons,
21 Chase and Tantiado discussed whether Tantiado would be able to make his quota. At his
22 deposition, Tantiado related the substance of this conversation as follows:

23 I recall Rob [Chase] asking me whether or not I would be able to sell
24 the products and make quota. And I told him that I would not be able
25 to sell the circular stapling line any longer because of my concern
26 with the stapling line's effectiveness, and that he was concerned with
27 whether I would be able to hit my number, or at least obtain a certain
28 amount of revenue for the months to come. And I told him that I
didn't feel that I would be able to hit my number with the limited
amount of stapling product that I would have to sell in order to, you
know, compensate for the items that I would not be able to sell. And

1 I think I had mentioned something to the effect of, that he -- I think
2 he said something like, "I don't think, I don't think they would want
3 to hear what you're saying." And, "I don't think" -- or something to
4 the effect that, "They would not be happy with, with what you're
5 saying.

6 And I told him that, you know, that I just couldn't sell the circular
7 stapling product line, and if that meant that I would be on -- that I
8 may possibly be terminated, then, you know, that's their prerogative.
9 And he, he said, "Okay, well, that's what I'll tell them." And that's
10 the gist of the conversation.

11 ...

12 Now, I don't believe that it was the quota that he was asking me to
13 hit, but the, a more manageable number that may have been less than
14 the actual quota. And I think he said something like, you know,
15 "You just want to make sure that they have -- that you know, they
16 are, you know, that you're making, you know, some sort of progress
17 in hitting your number."

18 (Tantiado Dep. at 96-97; *see also* Chase Dep. at 22-24.)

19 31. During his employment with PMI, Tantiado never told anyone at PMI that he believed
20 it was violating 21 U.S.C. § 351(a). (Tantiado Dep. at 187.)

21 32. Nor did Tantiado tell anyone at PMI that it was violating regulations related to 21
22 U.S.C. § 351(a). (Tantiado Dep. at 187.)

23 33. Tantiado did not notify anyone at PMI other than Chase of problems with PMI's
24 products except by submitting ICRs to the QAD. (Tantiado Dep. at 104; Plaintiff's Response to
25 Defendant's First Set of Interrogatories, Answer to Interrogatory No. 5.)

26 34. Tantiado never relayed any concerns about any of PMI's product lines to CEO
27 Whitman. (Tantiado Dep. at 111.)

28 35. Tantiado also never relayed any concerns about PMI's products to the FDA or any
other government agency. (Tantiado Dep. at 120.)

36. Chase did not convey anything that Tantiado told him during their discussion at the
American Society of Bariatric Surgeons meeting to anyone else. (Chase Dep. at 28.)

37. Chase did not convey anything that Tantiado told him during their discussion at the
American Society of Bariatric Surgeons meeting to Whitman. (Chase Dep. at 29.)

1 38. On June 17, 2006, Chase warned Tantiado that it was “critically important” that he
2 increase his sales. (Tantiado Dep. Ex. 23.)

3 39. For the first six months of 2006, Tantiado’s sales numbers were below what PMI
4 expected of him. For all twelve months of 2005, Tantiado had \$286,000 in sales. However,
5 during the six months of 2006, by contrast, Tantiado only had \$51,000 in sales. (Steffan Aff. ¶¶ 2-
6 3.)

7 40. In early July 2006, PMI held a managers meeting at which the general state of PMI’s
8 business was discussed. (Chase Dep. at 30, 84.)

9 41. Nobody from the QAD attended the managers meeting. (Chase Dep. at 35.)

10 42. At the managers meeting, Whitman met with Pat Holmes and Chase to discuss the sales
11 performance of the territory for which Chase was Regional Manager, including a discussion of
12 Tantiado’s 2006 sales performance which had declined precipitously from his 2005 sales numbers
13 and were below the minimum requirements for his job. (Affidavit of Michael Whitman
14 (“Whitman Aff.”) ¶ 2.)

15 43. Whitman asked Chase how Tantiado was doing, given his move from Senior Sales
16 Associate to Regional Manager and back earlier in the year. (Chase Dep. at 31, 33.)

17 44. Chase responded to Whitman that Chase did not think that Tantiado was fully engaged
18 in selling PMI’s products and that Chase felt there were “opportunities there to do more from a
19 sales perspective ... and engage more than what he was currently exhibiting or doing.” (Chase
20 Dep. at 31-33.)

21 45. Chase said nothing to Whitman about Tantiado’s reluctance to sell PMI’s circular
22 staplers. (Chase Dep. at 32.)

23 46. Based on Tantiado’s sales numbers, Whitman instructed Chase to terminate Tantiado’s
24 employment. (Whitman Aff. ¶ 3; Chase Dep. at 34, 42; Defendant Power Medical Intervention’s
25 Supplemental Answers to Plaintiff’s First Set of Interrogatories, Answer to Interrogatory No. 3.)

26 47. There was no discussion of product performance issues at the managers meeting.
27 (Chase Dep. at 31.)

1 48. Nor was there any discussion regarding difficulties related to the sale of PMI's circular
2 staplers. (Chase Dep. at 31.)

3 49. When Chase returned from the managers meeting, he informed Tantiado that his
4 employment had been terminated. (Tantiado Dep. at 127.)

5 50. Tantiado's employment with PMI terminated on July 10, 2006. (Tantiado Dep. Ex.
6 24.)

7 51. On July 12, 2006, Tantiado submitted expense reports to PMI seeking reimbursement
8 for \$4,464.03 in expenses. (Tantiado Dep. 135.)

9 52. However, for months before Tantiado's employment terminated, the University of
10 California San Francisco ("UCSF") had been trying to return products during the 60-day
11 evaluation period (as extended by Tantiado) for which PMI had already paid Tantiado a
12 commission. (Tantiado Dep. at 143; Tantiado Dep. Ex. 30; Affidavit of Rita Esposito ("Esposito
13 Aff.") ¶ 2, and Exhibit thereto.)

14 53. But rather than process the return, Tantiado tried to salvage the account by presenting
15 UCSF with alternative options and rallying the support of various surgeons to keep PMI's products
16 at UCSF. (Tantiado Dep. at 144-145.)

17 54. On the same day that Tantiado's termination became effective, PMI received an email
18 from UCSF informing it that it had been trying to return the products since February 2006 but
19 Tantiado had "either been unresponsive or an obstacle in getting these items returned." (Esposito
20 Aff. ¶ 2, and Exhibit thereto.)

21 55. Once the products were returned, PMI offset the commission it had already paid
22 Tantiado for the returned products against his pending expense reimbursement and paid Tantiado
23 the difference. (Tantiado Dep. at 158; Tantiado Dep. Ex. 31.)

24 **III. ARGUMENT**

25 **A. Tantiado's Wrongful Discharge Claim Fails As A Matter Of Law.**

26 An employer may discharge an at-will employee "for no reason, or for an arbitrary or
27 irrational reason," but is precluded from doing so "for an unlawful reason or a purpose that
28

1 contravenes fundamental public policy.” *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1094 (1992). *See*
 2 *also* Cal. Lab. Code § 2922. In assessing a claim for wrongful discharge on a motion for summary
 3 judgment, California courts apply the burden-shifting framework outlined in *McDonnell Douglas*
 4 *Corp. v. Green*, 411 U.S. 792 (1973). *See Benhabib v. Hughes Elecs. Corp.*, No. 04-0095, 2007
 5 U.S. Dist. LEXIS 87500 (C.D. Cal. Mar. 30, 2007). In order to establish a *prima facie* case of
 6 wrongful discharge, the plaintiff must initially establish each of the following elements: (1)
 7 plaintiff engaged in a protected activity; (2) his employer subjected him to an adverse employment
 8 action; and (3) there was a causal connection between the protected activity and the protected
 9 employment action. *Anderson v. Union Pac. R.R. Co.*, No. S-06-2813, 2008 U.S. Dist. LEXIS
 10 41776 (E.D. Cal. May 20, 2008). Once the plaintiff has established a *prima facie* case, the burden
 11 shifts to the employer to offer a legitimate, non-retaliatory reason for the adverse employment
 12 action. If the employer does so, the inference of retaliation is overcome, and plaintiff must then
 13 provide evidence to demonstrate that the legitimate reason proffered by the defendant is merely a
 14 pretext.

15 Tantiado claims that he was terminated for telling Chase that he lacked confidence in
 16 PMI’s products and, as such, was uncomfortable selling them. Tantiado’s wrongful discharge
 17 claim fails because he cannot establish a *prima facie* case and, even if could, the undisputed
 18 evidence is that Tantiado was terminated for poor performance, not because of his “discomfort.”

19 1. Tantiado Cannot Establish A *Prima Facie* Case.

20 a. Tantiado Did Not Engage In Protected Activity.

21 Tantiado cannot establish that he engaged in activity protected by “public policy.” The
 22 “public policies” giving rise to a wrongful discharge claim are exceedingly narrow. “Although our
 23 legislature has determined that an employment contract is generally terminable at either party’s
 24 will ... we have created a narrow exception to this rule by recognizing that an employer’s right to
 25 discharge an at-will employee is subject to limits that fundamental public policy imposes.” *Green*
 26 *v. Ralee Eng’g Co.*, 19 Cal. 4th 66, 71 (1998). The “public policy” asserted must be sufficiently
 27 described in a constitution, statute, or regulation “to enable an employer to know the fundamental
 28

1 policies that are expressed in that law.” *Sequoia Ins. Co. v. Superior Court*, 13 Cal. App. 4th 1472,
2 1480 (1993); compare *Morelewicz v. GEICO*, No. 04-56358, 2006 U.S. Dist. LEXIS 28638 (9th
3 Cir. Nov. 17, 2006) (plaintiff cannot cite preamble to show violation of statute that implicates
4 fundamental public policy). “A public policy exception carefully tethered to the fundamental
5 policies that are delineated in constitutional or statutory provisions strikes the proper balance
6 among the interests of employers, employees, and the public.” *Id.* This is because “tethering a
7 public policy claim to specific constitutional or statutory provisions serves not only to avoid
8 judicial interference with the legislative domain, but also to ensure that employers have adequate
9 notice of the conduct that will subject them to tort liability to the employees they discharge.”
10 *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 271-72 (2002).

11 Against this legal background, Tantiado’s claim that he engaged in protected activity must
12 fail because there is no “public policy” against firing employees who are uncomfortable
13 performing their jobs or lack confidence in their employer’s products. No constitutional provision,
14 statute, or regulation prohibits an employer from terminating such an employee. *See Green v.*
15 *Ralee Eng’g Co.*, 19 Cal. 4th 66 (1998). And no court has ever held otherwise, much less in the
16 context of a wrongful termination in violation of public policy case. This is not surprising.
17 Employees often convey some discomfort about aspects of their jobs. Expanding the narrow
18 “wrongful discharge in violation of public policy” exception to cover such expressions would
19 swallow the general rule of at-will employment.

20 Accordingly, Tantiado did not engage in any protected conduct. Since there is no provision
21 of law protecting employees who are uncomfortable with particular aspects of their jobs, Tantiado
22 cannot claim that he was fired for refusing to violate the law, exercising a right guaranteed by law,
23 or for reporting illegality, the only circumstances in which California courts have recognized
24 wrongful discharge claims. *See id.* (“[P]ublic policy cases fall into one of four categories: the
25 employee (1) refused to violate a statute; (2) performed a statutory obligation; (3) exercised a
26 constitutional or statutory right or privilege; or (4) reported a statutory violation for the public’s
27 benefit.”).

1 To avoid this problem, Tantiado now alleges that his termination was in retaliation for his
 2 complaints that PMI was violating “21 U.S.C.A. 351(e) and related regulations including 21 CFR
 3 803 and 21 CFR 820 et seq.,” which define the term “adulterated” for medical devices, among
 4 other things, under the Federal Food, Drug, and Cosmetic Act. There are three fundamental flaws
 5 in this argument. First, 21 U.S.C. § 351 does nothing more than define the word “adulterated.” It
 6 imposes no rights, obligations, privileges, or immunities. It is impossible to violate a definition.
 7 *See Sequoia Ins. Co.*, 13 Cal. App. 4th at 1480 (“a constitutional or statutory provision must
 8 sufficiently describe the type of prohibited *conduct*” (emphasis added)). Second, Tantiado never
 9 told anyone at PMI that he thought PMI was violating these provisions or was otherwise doing
 10 anything unlawful. All he said was that he “would not be able to sell the circular stapling line any
 11 longer because of his concern with the stapling line’s effectiveness.” Tantiado Dep. at 96. *See*
 12 *Stiesberg v. California*, 80 F.3d 353 (9th Cir. 1996) (affirming dismissal of plaintiff’s retaliation
 13 claim because “he reported no illegal conduct to anyone”). Third, Tantiado has presented no
 14 evidence that he had ever considered the sale of PMI’s products to be in violation of the statute or
 15 regulations which he cites in his complaint. *See Jhingan v. Roche Molecular Systems*, No. C 94-
 16 3176, 1996 WL 466577 (N.D. Cal. May 13, 1996).

17 Tantiado did nothing that is protected by public policy. PMI is entitled to summary
 18 judgment on Tantiado’s wrongful discharge claim.

19 b. There Is No Evidence Linking Whitman’s Termination Decision To
 20 Tantiado’s “Complaint”.

21 Ignoring for the moment that Tantiado’s expressions of “discomfort” with selling PMI’s
 22 circular staplers does not constitute protected activity, Tantiado cannot establish the requisite
 23 causal connection between his alleged protected activity and his termination. To establish
 24 causation, a plaintiff must prove, among other things, that the decision-maker was aware of the
 25 protected activity. *See Cocchi v. Circuit City Stores, Inc.*, No. C-05-1347, 2006 U.S. Dist. LEXIS
 26 20126 at *24-27 (N.D. Cal. Apr. 3, 2006) (granting summary judgment against plaintiff’s wrongful
 27 discharge claim where the decision-maker lacked knowledge that the plaintiff engaged in protected
 28 activity); *Adams v. Kmart Corp.*, No. C 00-03885, 2001 U.S. Dist. LEXIS 12827 (N.D. Cal. Aug.

1 10, 2001) (same). Yet, here, it is undisputed that: (1) Tantiado only expressed his discomfort with
2 selling PMI's circular staplers to Chase, (2) Chase never told anyone -- including Whitman --
3 about Tantiado's discomfort with selling the circular staplers, and (3) Whitman was the sole
4 decision maker regarding the termination of Tantiado's employment. Whitman could not have
5 been motivated to terminate Tantiado for engaging in protected activity because he had no idea
6 that Tantiado had engaged in such activity. Indeed, Whitman terminated Tantiado for poor sales
7 numbers, not for Tantiado's "discomfort" with PMI's products. These three undisputed facts
8 sound the death knell for Tantiado's wrongful termination in violation of public policy claim.²

9 It does not matter that Chase supplied Whitman with information Whitman relied upon in
10 terminating Tantiado. This Court's decision in *Adams v. Kmart Corp.*, No. C 00-03885, 2001 U.S.
11 Dist. LEXIS 12827 (N.D. Cal. Aug. 10, 2001), is directly on point. In that case, the plaintiff
12 claimed that he was wrongfully terminated in violation of public policy for reporting to his direct
13 supervisor, Mr. Barter, that another employee had re-labeled meat that was no longer fresh and had
14 tried to re-grind old hamburger meat. However, there was no evidence that Mr. Barter had
15 relayed this report to the individual who decided to terminate the plaintiff, Mr. Bronson. The
16 plaintiff argued, in effect, that the employer's summary judgment motion should be denied
17 because of the possibility that Mr. Barter recommended termination to Mr. Bronson because of the
18 plaintiff's protected activity, even though Mr. Bronson was oblivious to Mr. Barter's true reason
19 for the recommendation. The Court rejected this argument because there was no proof that Mr.
20 Barter recommended that the plaintiff be terminated. Similarly, here, there is no evidence
21 whatsoever that Chase recommended termination. Rather, he simply told Whitman that Tantiado
22 seemed unmotivated. As in *Adams*, Chase did not recommend that Whitman do anything.

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24
25 ² The only other individuals to whom Tantiado disclosed problems with PMI's products worked in
26 the QAD when he submitted ICRs pursuant to PMI's procedures established to receive exactly
27 those types of complaints. Aside from the fact that there is no evidence that anyone from the QAD
28 told Whitman that Tantiado had submitted ICRs, it is unlikely in the extreme that PMI would go
through the trouble of establishing such procedures only to "retaliate" against employees for using
them.

1 Tantiado's inability to establish a causal link between his "protected activity" and the
 2 termination means that he has no *prima facie* case. PMI is thus entitled to summary judgment on
 3 Tantiado's wrongful discharge in violation of public policy claim. The Court need proceed no
 4 further.

5 2. PMI Terminated Tantiado For A Legitimate Reason.

6 Even if Tantiado could establish a *prima facie* case, it would make no difference; PMI has
 7 articulated a legitimate business reason for terminating Tantiado's employment, and as discussed
 8 below, Tantiado has failed to present any evidence that that reason is false. It is undisputed that
 9 Tantiado's sales numbers were lower than expected. Moreover, Chase had told Tantiado that all
 10 he had to do is *sell something*, even if he did not meet his quota. It is also undisputed that
 11 Tantiado's 2006 sales numbers had dropped precipitously from prior years. Finally, it is
 12 undisputed that Whitman terminated Tantiado because his sales numbers were down and Tantiado
 13 appeared unmotivated to improve them. At the risk of stating the obvious, it is well-established
 14 that it is legitimate to terminate an employee for poor performance. *See, e.g., Hoy v. Sears,*
 15 *Roebuck & Co.*, 861 F. Supp. 881 (N.D. Cal. 1994) (failure to meet sales quota constitutes "good
 16 cause" for termination); *Knights v. Hewlett Packard*, 230 Cal. App. 3d 775, 780 (1991) ("Instances
 17 of poor performance are justifiable reasons for termination."); *Moore v. May Dept. Stores Co.*, 222
 18 Cal. App. 3d 836 (1990) (where "there [is] no hint that the asserted reason for [an employee's]
 19 termination was capricious or unrelated to business needs or goals, or pretextual. . . . a jury should
 20 not be allowed to decide the correctness of [the employer's] business judgment in terminating" the
 21 employee).

22 3. Tantiado Cannot Show That PMI's Legitimate Reason Is Pretext.

23 The burden thus shifts back to Tantiado to show that PMI's reasons for terminating his
 24 employment were a pretext, and the real motive was for engaging in conduct protected by a
 25 fundamental public policy. To meet this burden, Tantiado must produce *specific* and *substantial*
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 27
 28

1 evidence that PMI's reasons are really a pretext for discrimination. *See Aragon v. Republic Silver*
2 *State Disposal, Inc.*, 292 F.3d 654, 661 (9th Cir. 2002); *Martin v. Lockheed Missiles & Space Co.*,
3 29 Cal. App. 4th 1718, 1732-33 (1994) ("[T]o meet an employer's sufficient showing of a
4 legitimate reason for discharge the discharged employee, to avert summary judgment, must
5 produce *substantial responsive evidence* that the employer's showing was untrue or pretextual."
6 (emphasis added)). "For this purpose, speculation cannot be regarded as substantial responsive
7 evidence." *Martin*, 29 Cal. App. 4th at 1732-33.

8 There is no such evidence. As discussed above, the only information before Whitman
9 when he decided to discharge Tantiado was that his sales numbers were down and he was
10 unmotivated. There is no evidence that PMI did not discharge underperforming employees who
11 believed wholeheartedly in the effectiveness of PMI's products. Nor is there any other evidence
12 casting doubt on the legitimacy of PMI's reason for firing him, notwithstanding that the parties
13 have completed discovery. *See id.* ("The purpose of the summary judgment procedure, as we
14 perceive it, is to identify those cases in which there is no factual issue which warrants the time and
15 cost of factfinding by trial. Obviously the procedure cannot fairly serve its purpose unless and until
16 all parties have had sufficient opportunity, through discovery and otherwise, adequately to develop
17 their factual cases. But where, as here, the parties have received (and apparently have utilized)
18 that opportunity, we believe the correct rule to be that to meet an employer's sufficient showing of
19 a legitimate reason for discharge the discharged employee, to avert summary judgment, must
20 produce 'substantial responsive evidence' that the employer's showing was untrue or pretextual.").

21 Tantiado has thus offered nothing to show that PMI fired him for other than legitimate
22 business reasons. The motion for summary judgment should be granted.

23 **B. PMI Reimbursed Tantiado For All Expenses To Which He Is Entitled.**

24 Tantiado also alleges that PMI failed to reimburse him for all of his expenses because PMI
25 offset the commission it had already paid him for the UCSF products that were returned against his
26 expense reimbursement and paid Tantiado the difference.

1 1. Tantiado Was Fully Reimbursed.

2 PMI fully reimbursed Tantiado for his expenses. Tantiado admits that PMI offset the
3 commission it had already paid him for the products UCSF returned against his expense
4 reimbursement and paid him the difference. As a result, the question is not whether Tantiado was
5 reimbursed for his expenses. He was, although the reimbursement check was reduced by the
6 amount of the commission previously paid on the returned products. Rather, the real issue is
7 whether it was lawful to offset the commission against Tantiado's expense reimbursement.

8 California courts have upheld chargebacks in similar circumstances. In *Steinhebel v. Los*
9 *Angeles Times Communications*, 126 Cal. App. 4th 696 (2005), the court found that an employer's
10 chargeback of commission advances on newspaper subscriptions against telemarketers' future
11 advances on commission if customers did not keep their subscriptions was not a violation of
12 California Labor Code § 221, which requires employers to pay accrued wages. The telemarketers
13 were aware that a sale did not qualify as a "commissionable order" until the customer kept the
14 subscription for 28 days, and the telemarketers agreed that they would receive advances before the
15 employer could ascertain whether the sales would actually ripen into "commissionable orders."
16 The court held that advances on commissions did not constitute the payment of "wages," and the
17 28-day requirement was a condition precedent to the telemarketers' entitlement to a commission.
18 Similarly, in *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313 (2006), the court held that an employer
19 was entitled to chargebacks on commissions paid even though the compensation plans provided
20 that commissions would be paid when order was booked because employees had post-booking
21 responsibilities necessary to earn their commissions, and, although commission plans provided that
22 commissions would be paid at booking or installation, associates agreed that they were not in fact
23 earned at that time. Under these cases, the lawfulness of a chargeback depends on the terms of the
24 commission plan.

25 PMI's chargeback of the UCSF commission was lawful. It is undisputed that PMI paid
26 commissions on "net sales." Tantiado admits that "net sales" at PMI were determined by industry
27 practice. Chase, in turn, testified that under industry practice, sales commissions paid to sales
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1 representatives are subject to offset if those same products are subsequently returned by customers
2 during the evaluation period. That is exactly what happened here. PMI paid Tantiado a
3 commission on sales to UCSF, UCSF returned the products, and PMI charged back the
4 commission by offsetting it against Tantiado's final expense reimbursement check. PMI paid
5 Tantiado what he was owed.

6 There is nothing unlawful about offsetting the chargeback against Tantiado's expense
7 reimbursement. In *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007), the California
8 Supreme Court held that an employer does not violate California Labor Code § 2802 by increasing
9 an employees base salary or commissions to include an estimated prediction of expense
10 reimbursements, provided the employer makes it clear what portion of the salary or commissions
11 is compensation and what portion is expense reimbursement. But if the portion representing the
12 estimated expense reimbursement is not sufficient to cover actual expenses, the employer must
13 make up the difference: "section 2802 does not prohibit an employer's use of a lump-sum method
14 to reimburse employees for work-required automobile expenses, provided that the amount paid is
15 sufficient to provide full reimbursement for actual expenses necessarily incurred. Nothing in the
16 language of section 2802 restricts the methods that an employer may use to calculate
17 reimbursement, and we are required to construe section 2802 in a manner that produces a workable
18 and reasonable result." In a nutshell, employers can offset reimbursements against salary or
19 commissions. This case is the converse. Rather than offsetting reimbursements against
20 commissions, PMI offset Tantiado's excess commission against his expenses using a lump sum
21 method and told him that was what it was doing. It would defy reason to find that an employer
22 may permissibly offset reimbursements against commissions but cannot offset commissions
23 against reimbursements.

24 Tantiado's claim that the offset was somehow impermissible because the return was not
25 completed until after his employment terminated is disingenuous. UCSF told Tantiado months
26 before his employment terminated that it wanted to return the products. Tantiado then stalled, in
27 hopes of keeping PMI products at UCSF. It would be an odd rule that would permit an employee
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1 to ignore a customer's request for help in processing a return yet still be entitled to a commission
2 based on the fact that the products were not returned. Nevertheless, there is no reason for the
3 Court to contemplate such a rule since under *Steinhebel* and *Koehl*, the lawfulness of a chargeback
4 depends on the terms of the commission plan and, here, PMI's commission plan permits
5 chargebacks for products returned during the evaluation period.

6 PMI paid Tantiado exactly what he was owed. Therefore, PMI is entitled to summary
7 judgment on Tantiado's claim that PMI violated § 2802 by not reimbursing his expenses.

8 2. Accepting His Allegations As True, Tantiado Was Not Entitled To Have
9 His Expenses Reimbursed.

10 Be that as it may, Tantiado was not entitled to reimbursement at all. California Labor Code
11 § 2802(a), the statutory provision governing employee expense reimbursements, provides: "An
12 employer shall indemnify his or her employee for all necessary expenditures or losses incurred by
13 the employee in direct consequence of the discharge of his or her duties, or of his or her obedience
14 to the directions of the employer, even though unlawful, unless the employee, at the time of
15 obeying the directions, believed them to be unlawful." Here, Tantiado's complaint alleges that
16 selling the circular staplers "violated 21 U.S.C.A. § 351(e) and related FDA regulations including
17 21 CFR 803 and 21 CFR et seq." If Tantiado believed that the sale of PMI's products was
18 unlawful as he alleges in his complaint, he is not entitled to reimbursement for expenses incurred
19 in selling PMI's circular staplers under California Labor Code § 2802's plain language.

20 **IV. CONCLUSION**

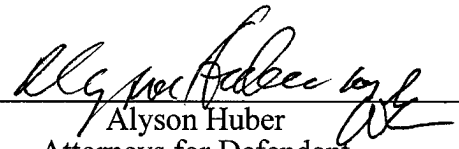
21 For the reasons stated herein, PMI respectfully requests that this Court allow its partial for
22 summary judgment on Tantiado's claims or wrongful discharge in violation of public policy and
23 failure to reimburse expenses.
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1 DATED: July __, 2008

2 Respectfully submitted,

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5 By: _____



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POWER MEDICAL INTERVENTIONS